



ISLAND COUNTY PLANNING & COMMUNITY DEVELOPMENT

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STAFF REPORT

TO: Island County Planning Commission

FROM: _____
Meredith Penny - Long Range Planner

DATE: May 13, 2016

REGARDING: Regulation Amendment to Fish and Wildlife Habitat protection regulations, Chapter 17.02.B of the Island County Code to address Growth Management Hearings Board Order 14-2-0009 issued June 24, 2015.

BACKGROUND

On September 22, 2014 the Island County Board of Commissioners adopted new Fish and Wildlife Habitat protection regulations (ICC 17.02B). On June 24, 2015, the Growth Management Hearings Board (GMHB) issued an order in response to an appeal asserting that the County's update complied with the Growth Management Act with respect to four of the issues raised in the appeal, and did not comply with respect to seven other issues. On March 28, 2016 the Island County Planning Commission approved the findings, recommendations and amendments to the Island County FWHCA regulations to address three of the seven issues. On May 3, 2016 the Board of Island County Commissioners then adopted an ordinance and findings to address those same three issues.

The purpose of this regulation amendment and is to address the Growth Management Hearings Board Order 14-2-0009 with regards to the remaining four issues:

Issue 1: Natural Area Preserve Buffers – Naas NAP

Issue 2: Designation of Habitat/Species of Local Importance: Western Toad

Issues 3 & 4: Plant Habitat: Prairies, Herbaceous Balds and Oak Woodlands

ANALYSIS

Issue 1 – Natural Area Preserve Buffers – Naas NAP

GMA defines critical areas at RCW 36.70A.030(5).¹ Department of Commerce guidelines² state that "[f]ish and wildlife habitat conservation areas that must be considered for classification and designation include: ... State natural area preserves...."³ The State Dept. of Commerce's Critical Areas Assistance Handbook elaborates, "[i]n some cases, the designation of fish and wildlife habitat conservation areas should include ... State natural preserves"⁴ Island County has designated state natural area preserves as fish and wildlife critical areas.⁵

Within these areas, habitat quality varies and the agency establishing the area typically includes sufficient land to ensure no net loss of critical habitat functions and values, so the designation does not result in imposing further restrictions on neighboring properties. However, in response to the Growth Board decision, the County took a closer look at this issue and retained technical consultants to ensure BAS informed its decision making.

Island County contains only one state designated Natural Area Preserve. This is a 33 acre site north of Camp Casey and Keystone Harbor, referred to as the Naas NAP. Whidbey Camano Land Trust owns the site, which is managed by the Land Trust and the State Department of Natural Resources, or DNR. In consulting with DNR and reviewing the BAS Report, the County has learned that DNR established the NAP borders so as to include sufficient buffering, excepting possibly an area owned by Seattle Pacific University.⁶ The BAS Report confirmed that development on the SPU property proximate to the Naas NAP should be evaluated for impacts on the NAP, but BAS does not support buffering elsewhere.

Based upon a review of the NAP property and its environs, the existing Island County NAP does not require additional buffering to the north or east, where existing development, ongoing agricultural uses, and roads truncate buffer functions. Where the rare forest community extends south beyond the boundaries of the NAP onto the Camp Casey property, buffer management provisions are warranted to ensure that the forest community within the NAP is adequately protected from edge effects, in particular blowdown susceptibility.⁷

As set forth in the BAS Report, natural area preserve buffering should be based upon habitat sensitivity and the type of development activity proposed. Possible regulatory language reflecting these findings is outlined below.

¹ "Critical areas include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."

² The legislature did not provide Commerce with rule making authority. RCW 36.70A.050 ("department shall adopt **guidelines**"), emphasis added.

³ WAC 365-190-130(2)(h) emphasis added.

⁴ Critical Areas Handbook, Protecting Critical Areas Within the Framework of the Washington Growth Management Act, Dept. of Commerce (formerly Dept. of Community, Trade & Economic Development) (Nov. 2003, Updated Jan. 2007), pg. 26, emphasis added.

⁵ ICC 17.02B.200(A)(3).

⁶ Note, zoning code setbacks may also apply to development.

⁷ Watershed Natural Area Preserve BAS Review (May 5, 2016), p. 4.

ICC 17.02B.430(E) The director shall determine the appropriate buffer for FWHCA other than streams based on best available science and the following guidance:

State natural area preserves, natural resource conservation areas, and state wildlife areas	Buffers shall not be required adjacent to these areas. These areas are assumed to as long as these areas encompass the land required for species preservation. The director may impose a new buffer or increase the applicable buffer if it is determined that a proposed development would infringe on or inhibit use of the entire property for species preservation. <u>The Planning Department shall confirm the public agency establishing and managing the area has included sufficient land within their buffers to ensure no net loss of habitat functions and values. If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby.</u>
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The above approach recognizes that often the management area already includes needed buffering, but also allows for those situations where further protections are warranted, and requires mitigation

Issue 2 – Designation of Habitat/Species of Local Importance: Western Toad

The federal Endangered Species Act does not list the Western Toad as endangered or threatened, and the state does not list the Toad as threatened or sensitive under WAC 232-12-011. During the County's last review and when the matter was before the Growth Board, the Western Toad was listed as a federal species of concern. Its status has since changed and the federal government is no longer considering it for listing. The Toad remains a state candidate species, as has been the case for at least the past eight years. Should its status change due to reclassification by either the federal or state governments to endangered, threatened or sensitive, the County's critical areas ordinance would automatically protect it.

The Growth Board stated that "the County agreed it departed from BAS in its failure to designate the Western Toad," but argued it had a reasoned justification.⁸ Given this holding, in considering this issue, the County elected to obtain current scientific analysis on the Toad to ensure any action considered was fully informed by and based on BAS. The County's BAS Report found that while the species' population is unknown, it is believed to number over 100,000. It is not known whether the local population is healthy or in decline. Although there are only three WDFW documented occurrences in the County (one of which is a breeding site), anecdotal evidence suggests the species could be more prevalent than has been assumed. But, if not, and if the species' populations are in decline, the causal factors are unknown. A number of potential stressors are identified in the BAS Report, but within Island County, development is not identified as a constraint.

It is difficult to regulate a species when BAS shows that it is unknown whether the species is in decline and if it is, what is causing that decline. In fact, adopting regulations without understanding root causes has the potential to harm a species. Such approaches could

⁸ WEAN v. Island County, GMHB No. 14-2-0009, FDO (June 24, 2015), pp. 38-39.

inadvertently protect predator species or create favorable conditions for the spread of disease. While the County could amend its critical area regulations so that its existing wetland and stream regulations protect documented breeding sites given that healthy wetland/stream functioning is better understood, at this juncture, the County has a poor scientific basis for taking further regulatory action with respect to the Western Toad. To protect breeding sites, the County could adopt language such as the below.

New Section, ICC 17.02B.201, Western Toad. Western toad breeding sites, as documented by scientifically verifiable data from WDFW, or a qualified professional, shall be protected through the County's wetland and stream critical areas regulations, presently codified in Title 17.

With regard to designating the species as one of local importance, the County has established criteria, which are set forth below.

ICC 17.02B.200(A)(5) Habitats and species of local importance. ... Habitats and species of local importance have the following characteristics:

- a. Habitats and species of local importance have recreational, cultural, and/or economic value to citizens of Island County.
- b. Habitats and species of local importance are not adequately protected, by other county, state, or federal policies, laws, regulations, or non-regulatory tools that prevent degradation of the habitat or species.
- c. Habitats and species of local importance represent either high-quality native habitat or habitat that has a high potential to recover to a suitable condition and which is of limited availability, highly vulnerable to alteration, or provides landscape connectivity which contributes to the integrity of the surrounding landscape.
- d. Habitats and species of local importance, without protection, would be diminished locally over the long term.

The Western Toad lacks the above characteristics, so does not meet the definition for a species of local importance. The Toad lacks recreational, cultural, or economic importance. Certainly, there are citizens who value the Toad, but it has gone largely unnoticed for many years within the County, with it being paid scant attention. The recent anecdotal sightings suggest there are citizens who have started to gain a greater appreciation for the species, but the species is not valued as a game species, has not been an integral part of County culture, and is not recognized as having any significant economic value.

BAS also does not support further protections. The federal government has elected not to list it and it is no longer classified as a candidate species. And, while the state has not decided whether to list it or not, state mapping does identify it as being present throughout most of the state, with its status being based apparently not on rarity, but lack of information. It is not known if the population is in decline and if it is, how it should be protected. The species has great flexibility in locating amenable habitat. It feeds under urban street lights, while also utilizing a wide range of natural habitats. Within Island County, BAS demonstrates that there are not development constraints on its natural habitat. As such, based on BAS, it has not been demonstrated that the species or its habitat will be diminished over the long term without further protection.

In addition to meeting the above definition, habitats and species of local importance must also meet the criteria below.

17.02B.500 - Habitats and species of local importance nomination process.

- A. ... **Nominated habitats or species must meet the definition in section 17.02B.200.** ...
- B.
 - 2. **A demonstrated need for special consideration based on:**
 - a. Habitat or species rarity or vulnerability to rarity as evidenced by restricted, small or declining species population and habitats or community loss or degradation; or
 - b. Vulnerability to habitat perturbation, including a discussion of and the potential cause of that perturbation; or
 - c. The need for protection, maintenance, and/or restoration of the nominated habitat to ensure the long term persistence of a species; or
 - d. The ability of the site to disproportionately contribute to regional biodiversity as evidenced by species use, richness, abundance, and/or rarity; or
 - e. The commercial, recreational, cultural, or other special value; or
 - f. The need for maintaining connectivity between habitat areas.
 - 3. An explanation of why special protection is needed and how existing county, state and federal programs and regulations do not provide adequate protection.
 - 4. Proposed management strategies for the species or habitats. Management strategies must be supported by best available science.
 - 5. Identification of effects on property ownership and use.
 - 6. The director may, on a case-by-case basis require additional information needed to evaluate the resource being nominated.
 - ...
- F. Following the recommendation of the Planning Commission, the Board of Commissioners shall designate a habitat or species of local importance that:
 - 1. Satisfies the nomination criteria and includes the information required in subsection B.; and
 - 2. Is supported by best available science for the subject species or habitat of local importance; and
 - 3. For which management strategies are practicable; and
 - 4. Without protection, there is a likelihood that the species or habitat will not persist over the long term.

As also addressed above, and based on BAS, the Western Toad lacks a demonstrated need for special consideration. It is unknown whether the species is vulnerable or in fact robust, as anecdotal reporting may indicate. If in decline, the causal factors are unknown. Development has not been identified as a habitat constraint locally. As such, the subsection B criteria are not met, BAS does not support designation, and management strategies (even if needed) are not known at this juncture. Further, BAS does not support a finding that without protection, there is a "likelihood" the species will not persist over the long term. Consequently, while protecting breeding sites and collecting further data on the species is a viable approach, taking further regulatory action without BAS support would be difficult.

Issue 3 – Plant Habitat: Prairies, Herbaceous Balds and Oak Woodlands

The Board determined that Island County failed to include BAS in its assessment of Westside Prairies, Oak Woodlands, and Herbaceous Balds as habitats of local importance.⁹ To address this issue, the County had scientific analysis prepared to inform its decision making so that its ultimate decision would be informed by and based on BAS.

In its BAS Report, the consultant identified 13 prairie and oak woodlands areas within unincorporated Island County. Four areas are located entirely within CAO jurisdiction; one is entirely within shoreline jurisdiction; and, eight others are potentially or partially within CAO jurisdiction.

The four areas known to be fully within CAO jurisdiction encompass approximately 64 acres or more. Two of these areas, encompassing approximately 53 acres, are protected under the existing Island County FWHCA 17.02B. The other two areas, totaling approximately 11 acres or more, do not appear to include regulated features.

Of the eight areas potentially or partially within CAO jurisdiction, which comprise approximately 153 acres, five sites, encompassing approximately 94 acres, are protected under the County's existing FWHCA regulations; the other four sites, totaling approximately 59 areas, do not appear to include regulated features. If the County wished to further protect these areas, it could do so. An example on how to approach this, utilizing a designation of local importance, is below.

Although the below approach would include the identified areas located outside of shoreline jurisdiction as areas of local importance, most of these sites are already protected by existing critical area regulations. Also, most, but not all, sites are publicly held and subject to state management protocols which are used to preserve the habitat. This is addressed in the BAS Report. Thus, these areas already have a significant degree of protection in place and in most cases are adequately protected. Thus, it is questionable whether the County's designation criteria are truly met. But, this extra layer of designation does ensure these identified prairie and oak woodland sites are protected so that to the extent there are any gaps in the regulatory structure, they are covered. As the Growth Board was concerned with regulatory gaps, this approach to ensuring those gaps are closed would address these concerns.

⁹ *WEAN v. Island County*, Case No. 14-2-0009, FDO (June 24, 2015).

17.02B.510 - Designated habitats and species of local importance.

Habitats and species of local importance and protected species that have been approved for designation by Island County include:

...

C. Prairie and Oak Woodlands, to the extent outside SMP jurisdiction:

- Deception Pass SP-Goose Rock
- West Beach/Ebey's Landing Golden Paintbrush Site
- West Beach - non-native grassland
- West Beach Road - Unsurveyed Grassland
- Ebey's Bluff
- Grasser's Hill (including area locally known as Schoolhouse Prairie)
- Naas (Admiralty Inlet) Natural Area Preserve
- Fort Casey State Park Golden Paintbrush Site
- Penn Cove Road
- San de Fuca schoolhouse
- Smith Prairie, including Au Sable Institute

RECOMENDATION

The Planning & Community Development Department recommends that the Planning Commission recommend approval of the changes to Island County's Fish and Wildlife Habitat protection regulations (ICC 17.02B).

Enclosures:

"A" – Finding of Fact and Amendments to the Island County Code Chapter 17.02B